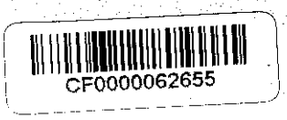
उच्च न्यायालय विधिक सेवा समिति

(2)



Division Bench (Criminal)

समक्ष माननीय उच्च न्यायालय ज्यूडीकेचर जबलपुर (म.प्र.)

क्रिमिनल अपील नंबर 2837/1999

अपील अन्तर्गत धारा- 374(2) दण्ड प्रक्रिया संहिता

अपीलार्थी/अभियुक्त (जेलगते) :- गुलाम सिद्दकी उर्फ सिद्दिक खान
पिता गुलाम सरवर,
आयु लगभग- 30 वर्ष,
निवासी- पणत पारा
जिला- राजनांद गाँव (मप्र0)

21/10 CIFF 9/10 Advocate Board M.P. 1999/1999

Filed on 20/10/99 by Shri Sandeep Kachhawaha Advocate

Dr. A.P.

विरुद्ध

प्रत्यर्थी / अभियोगी :- राज्य द्वारा आरक्षी केन्द्र बसंतपुर
राजनांद गाँव,
तहसील व जिला- राजनांद गाँव
(मप्र0)

दण्डादेश :- भारतीय दण्ड संहिता की धारा- 302 के अपराध को दोषसिद्धि के लिये आजन्म कारावास की सजा एवं 1000/- (एक हजार रुपये) का अर्थ दण्ड एवं अर्थ दण्ड की राशि अदा न करने की स्थिति में एक वर्ष की कठोर कारावास की सजा ।

अपील ज्ञापन

अपीलार्थी/अभियुक्त सत्र प्रकरण क्रमांक- 52/99 (राज्य विरुद्ध गुलाम सिद्दकी उर्फ सिद्दिक खान) में द्वितीय अपर सत्र

(37)

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आदेश पत्रक

मामला क्रमांक Criminal Appeal No. 2837/99 सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench:

Hon'ble Shri Justice L.C.Bhadoo, &
Hon'ble Shri Justice V.K. Shrivastava,JJ.

26/10/2006

Shri Sourabh Dangi, counsel for the appellant.

Shri G.D. Vaswani, Additional Public Prosecutor with Shri D.K. Gwalre, Dy. Govt. Advocate for the State.

Oral judgment dictated on *Dais*.

PER L.C. BHADOO, J.

This appeal is directed against the judgment of conviction and order of sentence dated 20/08/1999 passed by 2nd Additional Sessions Judge, Rajnandgaon, in Sessions Trial No. 52/99 whereby learned Additional Sessions Judge after holding the accused/appellant guilty, for committing murder of his wife Meena Bai under Section 302 of the IPC, sentenced him to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for one year.

The case of the prosecution, in brief, is that on 10/02/1999 at about 10.00 a.m. when deceased Meena Bai asked the accused not to consume liquor as he was in the habit of consuming excessive liquor, which infuriated the accused. He set Meenabai on fire after pouring kerosene oil on her body and ran away. Meena Bai was taken to District Hospital, Rajnandgaon from where written intimation (Ex.P/14) was sent by Dr. Mandal to Station House

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Officer, Police Station Basantpur, Rajnandgaon, requesting him to undertake the necessary steps for recording oral dying declaration. Accordingly, Executive Magistrate was requested for recording dying declaration of Meena Bai, on that request D.R. Thakur (PW8)-Executive Magistrate recorded dying declaration (Ex.P/7) in which Meena Bai stated that she was set on fire by her husband, accused/appellant. The statement was sent by the Executive Magistrate to Station House Officer, Police Station Basantpur, Rajnandgaon under Ex.P/8. On 11/02/1999 merg intimation under Ex.P/10 was sent by the hospital to the Station House Officer, Police Station: Basantpur, Rajnandgaon, on which merg intimation Ex.P/11 was registered at serial No.5 of 99. Request was made to Doctor by the SHO PS Basantpur, Rajnandgaon for conducting the postmortem on which postmortem on the body of Meena Bai was conducted by Dr.V.P. Mahiswar (PW/6), he prepared postmortem report (Ex.P/5). He opined that the cause of death was shock due to extensive burn injuries. First information report (Ex.P/15) was registered on receiving intimation from Praveer Tiwari, from District Hospital, Rajnandgaon. Investigating Officer after giving notice (Ex.P/2) to the Panchas, prepared inquest report (Ex.P/1) of body of Meena Bai. Site plan (Ex.P/3) was prepared by (PW/2) Tulsidas, Patwari.

During investigation, Investigating Officer seized the burn saree of the deceased and one plastic Jerricane under Ex.P/16. Site plan (Ex/P.17) was prepared by Praveer Tiwari, Investigating Officer. The seized articles were sent to Forensic Science

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Laboratory, Sagar, from where report dated 12/07/1999 (Ex.P/22) was received.

After completion of the investigation, charge-sheet was filed in the Court of Chief Judicial Magistrate, Rajnandgaon, who in turn committed the case to the Sessions Judge, Rajnandgaon, from where he received the case on transfer for trial.

The prosecution in order to establish the charge against accused examined fourteen witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he admitted the fact that the deceased was residing with him since last 13 – 14 years as his wife, however, he pleaded ignorance that how Meena Bai received burn injuries. He further stated that the evidence to the effect that he set Meena Bai on fire is false. He further stated that at the time of incident he was not at his residence. Meena Bai was in the habit of consuming excessive liquor and she received burn injuries after consuming the liquor, he is innocent and has been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused/appellant, convicted and sentenced the accused as mentioned in para one of this judgment.

We have heard Shri Sourabh Dangi, learned counsel for the accused/appellant and Shri G.D.Vaswani, learned Additional Public Prosecutor for the State.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

The fact that Meena Bai succumbed to the burn injuries, has not been disputed by counsel for the accused/appellant. There is no direct evidence in this case, the case rests on the dying declaration (Ex.P/7) recorded by PW/8 D.R. Thakur, Executive Magistrate and oral dying declaration made by the deceased before (PW/3) Hemchand Kumar, (PW/4) Babulal Dhurve, (PW/5) Pramila Bai, (PW/9) Lata Chourey and (PW/11) R.L. Sahu. PW/5 Pramila Bai has also been examined by the prosecution before whom the deceased made oral dying declaration, but she has turned hostile.

Learned counsel for the accused/appellant assailed the judgment on the ground that as per the evidence of PW/13 Praveer Tiwari, Investigating Officer and PW/8 D.R. Thakur, Executive Magistrate, doctor gave the certificate regarding fitness of the deceased for making dying declaration and the same has not been produced by the prosecution, therefore, inference should be drawn that the said certificate was against the prosecution that is why the same has been suppressed. He also argued that as per the version of the accused and the evidence of hostile witness PW/5 Pramila Bai, at the time of incident the accused was not at his residence and he had already left the residence before the incident to perform his duty as a driver. The statements of prosecution witnesses namely PW/3 Hemchand Kumar, PW/4 Babulal Dhurve and PW/9 Lata Chourey were recorded under Section 161 of the Cr.P.C after six days of the incident and this

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

delay was fatal, therefore, their evidence cannot be believed. He also argued that in the merg intimation (Ex.P/11) the word "by husband *(Pati Dwara)*" was inserted later on by marking arrow mark, therefore, this fact also creates doubt regarding fairness in investigation by the Investigating Agency.

On the other hand, Mr. G.D. Vaswani, Additional Public Prosecutor with Mr. D.K. Gwalre, Dy. Govt. Advocate supported the judgment of the trial Court.

In order to appreciate the arguments advanced by learned counsel for the accused/appellant, we have perused the record. It is true that PW/8 D.R. Thaukur, Executive Magistrate who recorded dying declaration (Ex.P/7) has stated in cross examination that before recording dying declaration he obtained fitness certificate from the Doctor and the same was sent along with forwarding letter (Ex.P/8). PW/13 Praveer Tiwari, Investigating Officer has also stated that the certificate was obtained by the Executive Magistrate before recording the dying declaration. But, perusal of the record shows that the said certificate has not been tendered into evidence and the same is available on the file of the trial Court below the document (Ex.P/14) whereby Doctor requested the Station House Officer, Police Station: Basantpur, Rajnandgaon, for making arrangement for recording the dying declaration of Meena Bai. As the said certificate is available on record, therefore, it cannot be said that the said certificate has been deliberately withheld by the prosecution as the same was against the prosecution. The said

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

certificate was given to the effect that Meena Bai was able to give her version, but it has not been tendered into evidence. In this background, we have to scrutinize the evidence of PW/8 D.R. Thakur, Executive Magistrate that as to whether Meena Bai was in a fit state of mind to give dying declaration. It is settled law that even if a fitness certificate regarding the condition of patient to give dying declaration is not obtained, and the Magistrate deposed that patient was fit to give dying declaration ~~and~~, therefore, dying declaration was recorded and that is proved, then conviction can be rested on such dying declaration, provided the dying declaration is proved to be voluntary, true and inspire confidence of the Court.

Perusal of the dying declaration shows that the same was recorded in question and answer form in which the deceased stated that there was no dispute between her and her husband, but her husband was in the habit of consuming liquor, that too excessive liquor and on the fateful day when she asked her husband not to consume liquor, accused became angry and set her on fire, after pouring kerosene oil on her body. PW/8 D.R. Thakur, Executive Magistrate has proved this dying declaration that the same was recorded by him and patient Meenabai was in a fit state of mind to give dying declaration. He has also denied the suggestion that any Police Officer was present at the time of recording of dying declaration. Nothing has come in cross examination to show as to why Executive Magistrate who is an independent Government officer has recorded a false dying

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

declaration in order to implicate the accused in a false case. Moreover, it has not been argued or stated by learned counsel for the accused that as to why Meena Bai, who was living with her husband since last 13 – 14 years as his wife, has implicated the accused in a false case. Even as per the dying declaration, deceased has categorically stated that the relations with accused/appellant were not strained, but the accused was in the habit of consuming liquor, when she asked him not to consume liquor, accused became angry and set her on fire after pouring kerosene oil on her body. Had deceased Meena Bai wanted to implicate the accused in a false case, then where was the necessity to say in her dying declaration that relations with her husband were not strained. Moreover, the above dying declaration made before the Executive Magistrate stands corroborated by the evidence of (PW/3) Hemchand Kumar, Head Constable of Police Station: Lalbagh, who has stated that at about 11.00 a.m. a woman was brought to the Police Station, Rajnandgaon, in a burnt condition from where she was sent to Government hospital in a government vehicle bearing No.407. She had stated that her husband set her on fire. The above evidence has been corroborated by PW/4 Babulal Dhurve, Constable of Home Guard who was on duty in the said Police Station on attachment. He has stated that on enquiry deceased Meena Bai made oral dying declaration that accused demanded money for liquor, which she did not give, that is why accused set her on fire after pouring kerosene oil on her body. The above evidence of the two witnesses

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित - 8 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

has also been corroborated by the evidence of PW/9 Lata Chourey who was on duty as a Police Constable at Rajnandgaon. It is true that out of three employees two employees belong to Police Department and one belongs to Home Guard, but similarly in the cross examination nothing has been brought on record to draw inference that they had deposed merely because they were Police employees. Even PW/3 Hemchand Kumar has stated that when deceased was brought to the Police Station, she was sent to Government hospital, Rajnandgaon, for treatment in a government vehicle bearing No.407.

Now, coming to the point that their statements were recorded under Section 161 of the Cr.P.C. with delay of six days, the question is as to whether the said delay was caused in order to concoct false evidence of three witnesses. If it is so established only then the delay in recording the statement under Section 161 of the Cr.P.C. becomes fatal, otherwise, merely recording the statement with delay of six days, *ipso facto* cannot render their evidence as false to implicate the accused. There was no necessity for the prosecution to create these witnesses because the deceased had already made dying declaration (Ex.P/7) on the day of the incident before the Executive Magistrate (PW/8) D.R. Thakur, that itself was sufficient for roping the accused in the crime. The evidence of these three witnesses stands corroborated by dying declaration made by the deceased before the Executive Magistrate. As such, for the above reasons, the argument

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -९-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

advanced by learned counsel for the accused/appellant is devoid of merit.

Now, coming to the question of insertion of words "by husband (*Pati Dwara*)" in merg intimation (Ex.P/11) is concerned, it is true that in written intimation (Ex.P/10) which was sent by the Hospital, based on which merg intimation (Ex.P/11) was recorded, it has not been mentioned that the deceased was set on fire by her husband. From perusal of Ex.P/11, it reveals that the word "by husband" (*Pati Dwara*) was inserted later on, but based on this insertion the whole prosecution case, looking to the evidence available on record, cannot be held to be a false. The Investigating Officer who recorded Ex.P/11 was knowing that Meena Bai made oral dying declaration before the Head Constable and Police for setting her on fire by her husband, the Officer who recorded Ex.P/11 might have based on that information, inserted the words "by husband" (*Pati Dwara*) but it cannot be said that these words were inserted after lapse of some time. Writing of pen shows that the same was inserted by same dot pen at the time of recording Ex.P/11, therefore, the argument advanced by learned counsel for the accused/appellant is devoid of merit.

As far as evidence of PW/5 Pramila Bai is concerned, she has stated that accused had already left his house for performing his duty as a driver. In the first instance, this witness has turned hostile. Moreover, she has not stated that at the time of incident, accused had left the house and he was not at his residence. On the contrary, she has stated that she herself left her house at

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..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -10-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

about 9.00 a.m. to work at some other residence and she returned at about 11.00 a.m. When she heard cries of the deceased, she saw Meena Bai in burnt condition. Her evidence is of no help in order to establish the plea of alibi.

As far as argument advanced by learned counsel for the appellant that the accused was not at his residence at the time of incident is concerned, the burden was on the accused to discharge the burden of *alibi* that accused was not at his residence. The accused has stated in his statement recorded under Section 313 of the Cr.P.C., that he was not at his residence, he has not stated that where he was at the time of incident, he has not produced any evidence to prove his presence elsewhere. Merely by saying that he was not at his residence, the burden of *alibi* cannot be considered to be discharged. The accused was required to prove with clear and cogent evidence that at the time of incident he was not present at his residence, particularly when deceased Meenabai has categorically stated that the accused set her on fire after pouring kerosene oil on her body, in the cross examination of any prosecution witnesses, accused has not been able to explain that his relation with deceased was strained and that is why he has been falsely implicated in the crime, therefore, the accused has not been able to discharge the burden in order to prove the plea of alibi.

The accused has stated in his statement under Section 313 of the Cr.P.C., that at the time of incident the deceased was in a drunken condition, therefore, she received the burn injuries.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -11-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

In the first instance, Doctor who conducted the postmortem and other witnesses before whom the deceased made oral dying declaration had not been cross-examined to the effect that the deceased was in drunken condition at the time of incident. Even, perusal of postmortem report reveals that the stomach was empty and pale. Had the deceased consumed alcohol before the incident, then there ought to have been smell of alcoholic substance in the stomach or intestine of the deceased. PW/13 P.K. Tiwari, Investigating Officer has been cross-examined on the point that the deceased herself poured kerosene oil on her body and she was in a drunken condition, but this suggestion has been denied by the said witnesses that deceased set herself on fire or she was in a drunken condition. PW/5 Pramila Bai has stated in the cross examination by the Public Prosecutor that Meena Bai was in a drunken condition, but at the same time, she has admitted that she had not informed the Police about this fact at the time of giving this statement, therefore, in the first instance, this witness has turned hostile and she did not disclose this fact to the Police at the time of giving her statement, therefore, this is after-thought. Moreover, as has been mentioned earlier that in the postmortem report, there is no indication regarding consuming of alcohol by the deceased at the time of incident. PW/8 D.R. Thakur who recorded the dying declaration in para 4 of his cross examination has stated that he cannot say whether Meena Bai had consumed the liquor or not. Therefore, there is no positive evidence that Meena Bai consumed the liquor before the incident.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -12-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

The last argument advanced by learned counsel for the accused/appellant was that the statement made by the deceased before the Police (Ex.P/11) that when Meena Bai was burning accused threw water on her body and ran away, therefore, there was no intention of accused to cause death of Meena Bai. In order to appreciate the argument advanced by learned counsel for the appellant, we have perused the record. Perusal of the postmortem report shows that there were 100% burn injuries all over the body of the deceased. If the accused was not having intention to cause death of Meena Bai by setting her on fire, then he ought to have made efforts for extinguishing the fire or he ought to have taken the deceased to hospital. The fact of 100% burn injuries received by deceased all over the body is suggestive of the fact that the accused set Meena Bai on fire in order to commit her murder. Merely by throwing water and running away, no inference can be drawn that accused threw the water on the body of deceased – Meena Bai in order to save her life. Intention of the accused can be gathered from the manner in which the crime was committed, the nature of the injuries sustained by the deceased on the various parts of the body as there were 100% burn injuries on the body of Meena Bai and the accused ran away after setting her on fire, therefore, it suggests that the accused set her on fire to cause her death.

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -13-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	As far as argument of learned counsel for the accused/appellant regarding provocation is concerned, the accused set Meena Bai on fire when Meena Bai asked the accused not to consume the liquor, but this is not a ground of provocation. Meena Bai had not in any manner fought or assaulted the accused, therefore, it cannot be ground for provocation to cause the death of deceased Meena Bai. In the result, we do not find any illegality or infirmity in the judgment of the trial Court. The appeal is devoid of merit, the same is liable to be dismissed and is hereby dismissed. Sd/- L.C.BHADOO Judge	Sd/- V.K. Shrivatava Judge

Raju

(पीछे देखिये)

30/10/06 19/11/06